agency does not act in the first instance."[24] The Commission must also recognize that:

> Revocation [of a rule] constitutes a reversal of the agency's former views as to the proper course. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.[25]

The Commission adopted and consistently adhered to its structural separation policy because it has understood that the BOCs' control of bottleneck local exchange and exchange access facilities gives them the ability to engage in a variety of anticompetitive practices relative to their CMRS rivals. That control has not changed in any material respect, as the Commission acknowledges in the NPRM, noting that "the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold."[26] Accordingly, since the predicate for the structural separation requirement has not changed, there is no rational basis for the Commission to now reverse course and rescind that requirement.

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[24] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (emphasis added).

[25] Id. at 41-42 (quoting Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973)) (quotations omitted).

[26] NPRM at ¶ 42.

The BOCs have argued that removal of the structural separation policy is necessary to yield the operational efficiencies of integrated wireline and wireless businesses. Under Section 601(d) of the 1996 Act, however, BOCs are permitted jointly to market and sell CMRS and landline services, removing one of the main alleged costs of separate operations.[27] Beyond that, the Commission notes, the BOCs have not specifically quantified the magnitude of the alleged benefits of consolidation or the costs of continuing under the Commission's standing policy.[28] Indeed, the speculative costs of the structural separation requirement are clearly insubstantial, for the BOCs' cellular operations have thrived, and enjoy a "firmly established brand name, vibrantly growing customer base," and "are financially solid."[29] Balanced against any hypothesized costs of the structural separation requirement is the real benefit of that requirement in assisting the Commission in deterring the BOCs from engaging in anticompetitive conduct and in detecting and curing such conduct when it occurs.

Once the interconnection agreements contemplated by the 1996 Act are implemented and genuine competition in local exchange and exchange access services begins to develop, the BOCs may well lose their capacity to engage in anticompetitive activities in providing cellular services, relative to their CMRS competitors.

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[27] Id. at ¶ 51.

[28] Id. at ¶ 52.

[29] Id. at ¶ 30.

That day, however, has not arrived, and therefore there is no rational basis for the Commission to eliminate the structural separation requirement at this time.

III. THE PROPOSED REVISIONS TO SECTION 22.903

A. BOCs' Cellular Affiliates Should Not Be Permitted to Own Landline Facilities for the Provision of Interexchange Services

Irrespective of whether it eliminates the structural separation requirement, immediately or after a transition period, the Commission proposes to amend Section 22.903(a) of its Rules "to permit a BOC cellular affiliate to own landline facilities for the provision of landline services, including competitive landline local exchange (CLLE) and interexchange service, in the same market with the affiliated incumbent LEC."[30] The provision of interexchange service by a BOC — including "any affiliate" — is specifically governed by Sections 271 and 272 of the Communications Act, which set forth a detailed series of requirements that must be satisfied before the BOC may provide in-region landline interLATA and other services as well as the conditions governing the provision of such services once the BOC secures authorization to provide them. The Commission should not allow the BOCs to circumvent Section 271 and provide in-region landline interexchange service, whether through their cellular

[30] Id. at ¶ 59.

subsidiaries or any other vehicle, before they obtain in-region authority.

In recently granting Ameritech Communications, Inc. ("ACI") a waiver of Section 22.903 to provide CLLE service, the Commission recognized the limitations of Section 271 and the continuing importance of the structural separation requirement.[31] The Commission noted that "ACI's separation both from incumbent cellular operations and from incumbent local exchange operations lessens considerably our concerns about the potential for improper cross-subsidization or discriminatory interconnection practices."[32] Nonetheless, the Commission pointedly noted that "any provision by ACI of interLATA interexchange service would be subject to the statutory provisions of the 1996 Act governing BOC entry into and provision of interLATA services . . . ."[33]

In addition, the Commission should recognize that the safeguards established in Sections 271 and 272 of the Communications Act -- especially the separation requirements of Section 272(b) -- to prevent the BOCs from improperly using their local exchange market power to gain an advantage over competitors in the in-region, interLATA service market will be worthless if BOCs are permitted to circumvent those safeguards by providing

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[31] Petition of Ameritech Communications, Inc. for Partial Waiver of Section 22.903 of the Commission's Rules, Memorandum Opinion and Order, CWD 95-14, FCC 96-339 (rel. Aug. 22, 1996) ("ACI Waiver Order").

[32] Id. at ¶ 19.

[33] Id. at ¶ 19 n.62.

in-region landline interLATA and local exchange service through the same affiliate, whether that affiliate is called a "competitive" LEC (CLEC) or otherwise.[34] A BOC should not be permitted to end-run the obligations and restrictions imposed on BOC local exchange operations by Sections 251, 252, 271 and 272 of the Act by establishing a "CLEC" free of those obligations and restrictions. Accordingly, if the Commission decides to amend Section 22.903(a) to permit BOC cellular services to be provided on an unseparated basis with their CLLE services, the affiliate providing such services should continue to be prohibited from owning any landline facilities for the provision of interLATA services or engaging in the provision of landline interLATA services in any way in the BOC's local service region.

B. BOC One-of-a-Kind Volume Discounts for Cellular Service Sold to the Affiliated BOC Telco Should be Prohibited, and All Rates, Terms and Conditions of Such Services Should be Publicly Disclosed

The Commission also seeks comments on whether it should impose conditions on the resale authority granted the BOCs' cellular affiliates pursuant to Section 601(d) of the Act. The Commission inquires whether "to prevent discriminatory resale practices, should we prohibit `one-of-a-kind' volume discounts for cellular service sold by the cellular affiliate to the

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[34] Thus, assuming that the BOC cellular structural separation rules are maintained in their current form, a BOC's interLATA affiliate could also provide cellular services, but a BOC's CLLE affiliate should not be allowed to provide either in-region landline interLATA or cellular service.

affiliated telephone company for resale to the end user . . . ."[35] The answer is clearly yes.

Even though the Commission detariffed cellular rates in 1994,[36] it did not give the BOCs free license to engage in discriminatory and anticompetitive practices in pricing their cellular services. If the Commission allowed the BOCs' cellular operations to sell services to their affiliated telcos on unique, one-of-a-kind terms, however, it would be sanctioning precisely that result. Indeed, given the BOCs' continuing market power in the provision of in-region cellular services, as discussed above, and their landline monopoly power, it would be particularly outrageous for the Commission to endorse this practice. Allowing the BOCs' cellular affiliates to offer unique volume discounts to their telco affiliates would enable the BOCs to further leverage their existing market power and to thwart the emerging CMRS competition. Thus, the Commission would be undercutting its own pro-competitive CMRS policies if it allowed the BOCs' cellular affiliates to engage in such practices.

Similarly, in cases where the LEC is reselling its cellular affiliate's service, the Commission should mandate public disclosure of the rates, terms and conditions of the service provided by the cellular affiliate to the LEC, in order to help prevent discriminatory resale practices. If the rates, terms and

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[35] NPRM at ¶ 67.

[36] Implementation of Section 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1479 (1994).

conditions of the sale of cellular service to the LEC are not disclosed, other competitive cellular resellers, such as MCI, will not know whether the LEC is exploiting its bottleneck power by receiving preferential rates or terms from its cellular affiliate.[37]

c. Sunset of Section 22.903

Given the rationale for the cellular structural separation requirements, MCI strongly objects to any sunset of such requirements, at least for in-region BOC cellular services, before the BOCs have lost all market power in the local exchange and CMRS markets. It would make no sense to eliminate those requirements as soon as the Section 271 requirements are satisfied for BOC in-region interLATA services, as the Commission proposes as "Option 1."[38] BOC cellular affiliates are supposedly subject to equal interconnection requirements now, but, as the Commission admits, those requirements are inadequate.[39] Rather than a flash-cut elimination of the cellular separation rules as soon as the conditions conducive to the development of local

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[37] MCI also concurs with the Commission's tentative conclusion that any joint marketing of local and LEC cellular service be carried out on behalf of the separate affiliate, subject to the affiliate transaction rules, on a compensatory, arm's-length basis, and subject to a written contract available for public inspection. See NPRM at ¶ 64. These requirements should help to minimize the discrimination and cross-subsidization that would ordinarily accompany the joint marketing of a monopoly service with one in which the LEC has little competition.

[38] NPRM at ¶¶ 79-80.

[39] Id. at ¶ 43.

competition are established, it would be far more prudent to wait until that goal has been accomplished and significant CMRS competition becomes a reality. Otherwise, local exchange and CMRS competition will be stillborn, as safeguards are withdrawn before competition has a chance to thrive on its own.

IV. OTHER CMRS SAFEGUARDS

MCI concurs with the Commission's tentative conclusion that, on balance, the benefits of applying structural separation to non-BOC LECs would not justify the costs.[40] Moreover, MCI also agrees that if the Commission decides not to impose structural separation on other LEC cellular services or other CMRS, the nonstructural safeguards proposed in paragraphs 116-24 of the NPRM should be imposed at least on all in-region Tier 1 LEC cellular, PCS and other CMRS. As the Commission notes, these nonstructural safeguards are more likely to be at least somewhat effective in facilitating competition in the PCS market if the BOC cellular structural separation requirements are maintained, since such separation may make it easier for all CMRS providers to secure nondiscriminatory interconnection with the BOCs' local exchange networks.[41] The nonstructural safeguards proposed in the NPRM are the bare minimum that should be imposed on non-BOC cellular services and other LEC CMRS.

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[40] See id. at ¶¶ 54-57.

[41] See id. at ¶ 123.

V. CONCLUSION

For the reasons stated above, the Commission should retain its structural separation requirement for the BOCs' provision of cellular services and otherwise adopt the recommendations presented herein.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

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Its Attorneys

October 3, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996, and Section 222 and 251(c)(5) of the Communications Act of 1934	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	
Requests of Bell Atlantic-NYNEX Mobile, Inc., and U S West, Inc. for Waiver of Section 22.903 of the Commission's Rules	)	

To: The Commission

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: October 24, 1996

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SUMMARY

The comments filed in this proceeding permit the Commission to reach only one conclusion: the structural separation rule governing the BOCs' provision of cellular services must be retained because it continues to serve important public interest objectives and because the concerns that led to its adoption continue to exist. In urging the Commission to eliminate the rule, the BOCs fail to establish that such a change in policy is justifiable, given that the BOCs continue to possess monopoly control of the wireline market and dominate the wireless market, and that substantial competitive entry into those markets will not develop for the foreseeable future. In these circumstances, the rule helps to prevent improper subsidization of BOC wireless services, deter interconnection discrimination by the BOCs' wireline operations against competing wireless carriers, and facilitate the detection of anticompetitive conduct by the BOCs.

There is clearly no merit to the contention of Bell Atlantic-NYNEX that the Commission has no authority under the Telecommunications Act of 1996 to retain the structural separation rule. Contrary to its claim, Section 272 of the Act only narrowly exempts certain BOC "incidental interLATA services" from its separate affiliate requirement and says nothing about BOC local cellular service. Moreover, Section 601(c)(1) of the Act explicitly preserves such pre-existing regulations as the BOC cellular separation rule. Furthermore, Section 271(h) instructs the Commission to ensure that a BOC's provision of cellular

services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."

The comments also confirm MCI's recommendation that the Commission should not amend Section 22.903(a) of its Rules to permit a BOC affiliate to own landline facilities for the provision of interexchange services in the same market as its affiliated incumbent LEC before the BOC obtains in-region interLATA authority, nor should it permit any BOC affiliate, cellular or otherwise, to provide both landline in-region interLATA and landline local service or to own landline facilities for the provision of both types of services. Giving a BOC that license would impermissibly enable it to circumvent the strict requirements of Sections 271 and 272 of the Act governing the provision of in-region interLATA services.

The comments also support MCI's further recommendation that the Commission prohibit the BOCs' cellular affiliates from providing "one-of-a-kind" volume discounts for cellular services sold to affiliated BOCs for resale, and that it require the public disclosure of rates, terms, and conditions where the LEC resells its cellular affiliate's service. Finally, MCI agrees with other parties that the Commission not sunset Section 22.903 until the BOCs have lost all market power in the local exchange and CMRS markets and thus the ability and incentive to engage in anticompetitive conduct in the provision of wireless services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), pursuant to Section 1.415 of the Commission's Rules, hereby replies to the initial comments filed in response to the Commission's Notice of Proposed Rulemaking (NPRM), FCC 96-319 (rel. Aug. 13, 1996), in the above-captioned proceeding.

I. INTRODUCTION

In the NPRM, the Commission reviewed its longstanding policy mandating structural separation for the provision of cellular service by Bell Operating Companies (BOCs or RBOCs). This policy has served the public interest well. The structural separation

requirement has helped to prevent and detect improper subsidization of BOC wireless services, inhibited interconnection discrimination by the BOCs' local exchange operations against competing wireless carriers, and facilitated the detection of anticompetitive conduct by the BOCs.[1] Without this competitive safeguard, it is likely that even less competition would have developed in wireless communications services, and it should be retained because the same essential public interest concerns that led to its adoption continue to exist.

The BOCs retain their monopoly over most of the nation's wireline networks, enjoy, on average, wireless voice communications market share in excess of 50 percent, and they will continue to dominate the wireline and wireless markets for many years to come, notwithstanding the Telecommunications Act of 1996 (1996 Act). This Act is facilitating the efforts of new wireline market entrants to interconnect with incumbent local exchange carriers (LECs) and to provide competitive local exchange service, but that competition is barely beginning and has not yet made any significant inroads into the monopoly position enjoyed by the incumbent BOCs. Moreover, competition in the provision of wireless services is also at an incipient stage of development, for the Commission has not even completed its auctions of 2,074 broadband personal communications services

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[1] Cellular Communications Systems, 86 FCC 2d 469, 494-95 (1981) (Cellular Order).

(PCS) licenses, which will provide the basis for competition with the incumbent cellular telephone operators.

As MCI demonstrated in its initial Comments, the BOCs will retain for the foreseeable future the ability and the incentive to engage in the anticompetitive conduct that was the rationale for the Commission's structural separation safeguard. Thus, since the marketplace conditions and public interest concerns underlying the separate subsidiary requirement have not changed -- and the BOCs fail to demonstrate the contrary -- there is no public interest justification for the Commission to change its policy and eliminate that requirement as it proposes in the NPRM. The Commission should therefore retain its structural separation rule until the record clearly demonstrates that the BOCs no longer possess any market power in the provision of wireline communications services and lack the capacity to engage in a variety of anticompetitive practices in the provision of wireless services.

II. THE COMMISSION SHOULD RETAIN ITS BOC CELLULAR STRUCTURAL SEPARATION REQUIREMENT

Eliminating the structural separation requirement would represent a substantial policy change that could be justified only by material record evidence that the rule is no longer needed. However, the indisputable state of the current wireline and wireless markets -- as the Commission found in the NPRM -- demonstrates that no such policy change is justified.

The Commission's central concern in imposing a structural separation requirement for cellular service was the public interest implications flowing from the domination of AT&T, and then the BOCs, over the wireline local exchange network. Thus, in its 1983 BOC Separation Order, the Commission determined that:

> the RBOCs will control substantial local exchange and intrastate-intraLATA facilities in large geographic regions. Each RBOC will serve from 20 to 30 million people within its territory. These figures represent from 70 to 92 percent of the population in the states in which the RBOCs will operate. In addition, the RBOCs will control from 9.7 million to 13.9 million access lines in their respective territories.[2]

On that basis, the Commission reasoned that "the potential for anticompetitive abuse against cellular carriers" existed "due to the BOCs [sic] control over local exchange facilities and, hence, control of access to the network . . . ."[3]

In the instant proceeding, a number of commenters agree that the Commission should retain its structural separation rule because the fundamental underpinning for that rule has not changed. AT&T Wireless Services, Inc. (AT&T), CMT Partners (CMT), Comcast Cellular Communications, Inc. (Comcast), Cox Communications, Inc. (Cox), the Public Utilities Commission of Ohio (PUCO), Radiofone, Inc. (Radiofone), and U S West, Inc. (U S West) all urge the Commission to retain the structural separation

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[2] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1133 (1983) (BOC Separation Order).

[3] Id. at 1136.

rule.[4] Moreover, AT&T, CMT, Comcast, and Cox confirm MCI's view that the factual predicate for the Commission's structural separation rule has not changed.[5]

The BOCs clearly continue to possess the ability to afford their cellular affiliates preferential interconnection and rates,[6] and to subsidize unlawfully their competitive wireless operations with revenues from noncompetitive services under the FCC's price cap regime.[7] As Comcast observes, "the Notice contains no rationale for abandoning structural separation, and the reasoning contained in the Notice actually supports retention of structural safeguards as to cellular . . . ."[8]

Not surprisingly, Ameritech, Bell Atlantic Corporation and NYNEX Corporation (Bell Atlantic-NYNEX), and SBC Communications Inc. (SBC) argue that the Commission should dispense with its cellular structural separation requirement,[9] claiming that it is

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[4] Comments of AT&T at 5; CMT at 5; Comcast at 2; PUCO at 4, 10, 21; Radiofone at 4; U S West at iii, 22 (in favor of retaining the structural separation requirement to protect emerging broadband PCS providers).

[5] Comments of AT&T at 5-6, 10; CMT at 5, 10; Comcast at 3-5, 7; Cox at 2-3.

[6] Comments of AT&T at 7.

[7] Comments of AT&T at 8; Comcast at 13; PUCO at 8-9.

[8] Comments of Comcast at 4.

[9] Comments of Ameritech at 3-4, 10; Bell Atlantic-NYNEX at 8-12; SBC at 3-4.

either no longer permitted[10] or unnecessary.[11] Notably, however, these BOCs fail to address the point, which the Commission acknowledges, that the factual basis for the separation requirement has not changed.[12]

Thus, Ameritech alleges without any foundation "that BOCs no longer have the ability to leverage any alleged monopoly to favor competitive wireless services."[13] Bell Atlantic-NYNEX argue erroneously that "the premise underlying [the Commission's Rule] was long ago abandoned" because the Commission has developed nonstructural safeguards in other contexts.[14] Finally, SBC mistakenly claims that the competition that will materialize as a result of the 1996 Act and the protections afforded by the Commission's cost allocation rules will provide sufficient safeguards so that the structural separation rule is no longer necessary.[15]

However, these BOCs do not seriously challenge the Commission's finding in the NPRM that:

> although there have been vast changes in the nature of the wireless market since the 1981

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[10] Comments of Bell Atlantic-NYNEX at 11-12.

[11] Comments of SBC at 3, 5.

[12] In the NPRM, the Commission concluded, inter alia, that the BOCs "retain market power in the local exchange market, and therefore control over public switched network interconnection, within their in-region states." NPRM at ¶ 42.

[13] Comments of Ameritech at 4.

[14] Comments of Bell Atlantic-NYNEX at 9.

[15] Comments of SBC at 3-4.

> imposition of our BOC cellular structural separation requirement, the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable, and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold.[16]

In addition, there is no merit to Bell Atlantic-NYNEX's argument that, under the 1996 Act, the Commission does not have "authority to maintain structural separation for the provision of cellular service."[17] Bell Atlantic-NYNEX contend that Congress identified the group of services that must be provided by BOCs on a structurally separated basis in Section 272(a)(2) of the Act, but carved "CMRS and other incidental interLATA services" out of that separated subsidiary requirement.[18] From this reading, Bell Atlantic-NYNEX contend that "Congress' deliberate exemption of CMRS from the separate subsidiary provisions of Section 272 provides clear direction that the Commission cannot subject this service to structural separation."[19] Bell Atlantic-NYNEX are wrong.

Section 272(a)(2)(B)(i) exempts certain BOC "incidental interLATA services" from the Section 272(a)(2) separate affiliate requirement. Those incidental interLATA services are defined in Section 271(g) to include "the interLATA provision by a Bell

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[16] NPRM at ¶ 42.

[17] Comments of Bell Atlantic-NYNEX at 11.

[18] Id.

[19] Id. at 12.

operating company or its affiliate . . . of commercial mobile radio services in accordance with section 332(c) of this Act . . . ."[20] Section 271(h), in turn, cautions that "[t]he provisions of subsection (g) are intended to be narrowly construed."[21] Moreover, Section 271(h) adds, "[t]he Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[22]

Thus, the statutory provisions referenced by Bell Atlantic-NYNEX exempt the provision of interLATA BOC CMRS/cellular service from the stringent separation requirements of Section 272(b), but they are silent on the provision of local BOC CMRS/cellular service. Even under the Bell Atlantic-NYNEX theory, therefore, the absence of any statutory provisions as to local BOC CMRS/cellular should give the Commission free reign to regulate such services as it sees fit. Bell Atlantic-NYNEX never address this obvious flaw in their argument. Moreover, even as to interLATA BOC CMRS/cellular, the statutory exemption from the stringent Section 272 requirements does not preclude the Commission from maintaining its long-standing, less strict cellular separation requirements, since the 1996 Act "shall not be construed to modify, impair or supersede Federal ... law

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[20] 47 U.S.C. § 271(g) & (g)(3) (emphasis added).

[21] 47 U.S.C. § 271(h).

[22] Id. (emphasis added).

unless expressly so provided in such Act or amendments."[23] As the Commission has explained, Congress "did not intend by implication to repeal [the Commission's] authority to impose ... regulatory treatment as [the Commission] deem[s] necessary to protect the public interest,"[24] especially in light of the explicit command of Section 271(h) that "[t]he Commission shall ensure that the provision of [interLATA CMRS] ... by a [BOC] or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."

III. THE PROPOSED REVISIONS TO SECTION 22.903

As MCI explains in its Comments, the Commission should not adopt its proposal to amend Section 22.903(a) "to permit a BOC cellular affiliate to own landline facilities for the provision of landline services, including competitive landline local exchange (CLLE) and interexchange service, in the same market with the affiliated incumbent LEC."[25] The provision of "in-region" interexchange service by a BOC -- including "any affiliate" -- is specifically governed by the requirements of Sections 271 and 272 of the Communications Act. Unless and until a BOC satisfies the requirements of Section 271, it cannot provide in-region interLATA services except incidental to

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[23] Section 601(c)(1) of the 1996 Act.

[24] Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, FCC 96-288 (released July 1, 1996) at ¶ 29.

[25] NPRM at ¶ 59 (emphasis added).

cellular service. Consequently, the Commission should not permit BOCs to achieve an end run around those statutory requirements and provide in-region landline interexchange service not incidental to cellular service before they obtain in-region authority, whether through cellular subsidiaries or any other vehicle, nor should they ever be allowed -- as long as there is a separate interLATA affiliate requirement -- to provide such services through the same affiliate that provides "competitive" or any other variety of local services, whether or not that affiliate also provides cellular service.

There is no merit to SBC's claim that the "recent granting of the ACI waiver supports the Commission's conclusion."[26] As MCI noted in its Comments, the Commission specifically acknowledged restrictions on the BOC provision of interexchange service in the recent Memorandum Opinion and Order[27] resolving the petition of Ameritech Communications, Inc. ("ACI") for waiver of Section 22.903. In considering ACI's request to provide in-region CLLE service, the Commission observed that "ACI's separation both from incumbent cellular operations and from incumbent local exchange operations lessens considerably our concerns about the potential for improper cross-subsidization or

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[26] SBC Comments at 10-11.

[27] Petition of Ameritech Communications, Inc. for Partial Waiver of Section 22.903 of the Commission's Rules, Memorandum Opinion and Order, CWD 95-14, FCC 96-339 (rel. Aug. 22, 1996) ("ACI Waiver Order").

discriminatory interconnection practices."[28] Nevertheless, the Commission added, "any provision by ACI of interLATA interexchange service would be subject to the statutory provisions of the 1996 Act governing BOC entry into and provision of interLATA services . . . ."[29] Thus, consistent with the ACI Waiver Order, the Commission should not permit BOCs — or any affiliate — to provide in-region interexchange service until authorized under the 1996 Act and should not permit the BOCs to provide in-region landline interLATA services through the same affiliate that provides any type of landline local service.

In its Comments, MCI also urged the Commission to prohibit "one-of-a-kind" volume discounts for cellular service sold by the cellular affiliate to the affiliated BOC for resale.[30] Because the Commission detariffed cellular rates in 1994,[31] the rates, terms, and conditions of unseparated BOC cellular resale are not publicly known. In this light, there is a substantial possibility that the BOCs could engage in discriminatory offerings in such an environment if they are allowed to provide "one-of-a-kind" volume discounts.[32] For the same reason, MCI recommended that the Commission require the public disclosure of

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[28] Id. at ¶ 19.

[29] Id. at ¶ 19 n.62.

[30] NPRM at ¶ 67.

[31] Implementation of Section 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1479 (1994).

[32] See Comments of Radiofone at 9.

rates, terms, and conditions where the LEC resells its cellular affiliate's service.[33]

Not surprisingly, Bell Atlantic-NYNEX argue that there should be no restrictions on the BOCs' ability to provide such volume discounts for affiliated BOC resale and no requirement that resale terms be disclosed publicly.[34] With regard to volume discounts, Bell Atlantic-NYNEX claim that current cost allocation and resale nondiscrimination rules are sufficient to guard against preferential treatment for affiliated BOCs.[35] With regard to the public disclosure of resale rates, terms, and conditions, Bell Atlantic-NYNEX argue that such disclosure dampens vigorous price competition.[36]

As the Commission noted in the NPRM, however, BOCs and their cellular affiliates have the capacity to engage in preferential arrangements in a resale context in a way that disadvantages cellular competitors.[37] As Radiofone observes in its Comments, the existing nondiscrimination safeguards are not sufficient to guard against all forms of BOC cellular discrimination.[38] These

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[33] See also Comments of CMT at 17; Radiofone at 9.

[34] Comments of Bell Atlantic-NYNEX at 28-29.

[35] Id. at 28.

[36] Id. at 28-29. It is somewhat ironic that Bell Atlantic-NYNEX argued against public disclosure on the grounds that it could foster "anticompetitive conduct." Comments of Bell Atlantic-NYNEX at 28-29.

[37] NPRM at ¶ 67.

[38] Comments of Radiofone at 9.